## SANBOS (MALAYSIA) SDN BHD v. GAN SOON HUAT

COURT OF APPEAL, PUTRAJAYA
AB KARIM AB JALIL JCA
NOR BEE ARIFFIN JCA
RAVINTHRAN PARAMAGURU JCA
[CIVIL APPEAL NO: W-01(A)-665-11-2019]
15 MARCH 2021

***LABOUR LAW:*** *Dismissal – Constructive dismissal – Proof – Payment of commission to employee – Rate varied by employer – Whether employee adversely affected by variation – Whether fundamental breach – Delay in terminating employment – Whether unduly long – Whether breach condoned by employee – Industrial Relations Act 1967 (Revised 1976), s. 20*

***LABOUR LAW:*** *Employment – Contract of employment – Terms and conditions – Commission – Payment of commission to employee – Rate varied by employer – Whether fundamental breach – Whether going to root of contract of employment – Constructive dismissal – Whether justified*

***JURISDICTION:*** *Industrial Court – Dismissal – Constructive dismissal – Employee claiming monetary award but not reinstatement – Whether Industrial Court ceased to have jurisdiction over dispute – Threshold jurisdiction – Substantive jurisdiction – Industrial Relations Act 1967 (Revised 1976), ss. 20 & 30*

The respondent was working as a sales representative of the appellant for which he was paid both salary and commission. It was not in dispute that the commission payable was regulated by the Sales Commission Scheme executed between the parties ('Scheme'). In 2009, the appellant revised the Scheme. Then, on 1 May 2016, the appellant again revised the Scheme whereby it removed the State of Negeri Sembilan from the respondent's coverage and increased the respondent's monthly sales target. The respondent objected to the latter revision of the Scheme alleging that it adversely affected his commissions. The appellant gave some extra personal benefits to the respondent, but otherwise remained adamant with the revision. And so it was that some nine months later, on 10 March 2017, the respondent, pleading constructive dismissal, left his employment.

In his claim before the Industrial Court, the respondent however only sought monetary award and not reinstatement. The Industrial Court held, by reason of the omission to seek reinstatement, that it had no jurisdiction over the dispute and dismissed the claim. The respondent applied to the High Court for judicial review, whereof the judge, overruling the Industrial Court, opined that the tribunal's jurisdiction could not hinge on or be hindered by a workman's failure to state his desire to be reinstated to his former employment. The judge also found constructive dismissal proved, as the revision which substantially reduced the respondent's commissions

A constituted a fundamental breach of the respondent's terms of employment. The appellant appealed and argued that whilst the Industrial Court might have 'threshold jurisdiction' it did not have 'substantive jurisdiction' to hear the dispute, and further that, the respondent, having waited for nine months after the impugned revision before terminating his employment, had
B condoned the same and was barred from claiming constructive dismissal. The issues that arose were: (i) whether the Industrial Court had substantive jurisdiction to hear the dispute notwithstanding the omission to pray for reinstatement; and (ii) whether the respondent had been dismissed without just cause or excuse.

C **Held (allowing appeal; setting aside decision of High Court):**

**(1)** The Industrial Court was seized with 'threshold jurisdiction' to hear the dispute after the same had been referred to it by the Minister and was not deprived of it merely because the remedy of reinstatement was not pleaded or asked for at the hearing. (paras 22-24)

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**(2)** At the point of making representation for unfair dismissal to the Director General under s. 20(1) of the Industrial Relations Act 1967 (Revised 1976) ('the Act'), an employee is obliged to seek 'to be reinstated in his former employment'. This is the only reference in the
E Act to the remedy of reinstatement in so far as the prosecution of an employee's claim is concerned. The other is on the power of the Industrial Court to grant the remedy when making the award under s. 30. It follows that the requirement to plead reinstatement as a remedy is only material at the stage of making a representation, and once the case is referred to the Industrial Court by the Minister, as in this case,
F there is no longer any requirement for the employee to plead the remedy. The Industrial Court Rules 1967 which governs the procedure of the Industrial Court does not impose the obligation to plead the remedy of reinstatement in the statement of case either. (paras 27 & 28)

G **(3)** The real issue that arises from the 'substantive jurisdiction' argument is whether the Industrial Court would exceed its statutory powers in granting monetary relief when reinstatement is not pleaded or asked for. The question must be answered in the negative, as s. 30(6) of the Act empowers the Industrial Court to include in the award 'any matter or thing which it thinks necessary of expedient'. What this means is that
H whether reinstatement was or was not pleaded and asked for, the Industrial Court cannot be said to commit an error of law if it grants monetary or other relief to the employee. It is also not the function of the Industrial Court to question its own jurisdiction simply because the remedy of reinstatement is not pleaded or sought. Hence, the question
I of the tribunal ceasing to possess 'substantive jurisdiction' could not arise. (paras 28, 29 & 30)

**(4)** The dispute here was about the variation of the rate of the payable commission. Hence, the matter of the respondent's resignation should be approached by answering the question whether under the terms of the employment contract the appellant was entitled to vary the sales commission rate in question. The facts showed that the employment contract referred to the sales commission as 'incentive' and it did not state that the rate was fixed or that it could not be varied. The respondent too had accepted a previous revision of the sales commission rate in 2009. The respondent thus could not take the position as if the sales commission rate was unalterably cast in stone, and the Judge erred in holding that the revision of the sales commission rate was a fundamental breach of the contract of employment. (paras 40 & 41)

**(5)** The High Court erred in holding that the removal of the State of Negeri Sembilan from the respondent's area of coverage constituted a breach of a fundament term of the contract of employment. The respondent's letter of appointment did not include the State as part of the respondent's area of coverage. It was added much later. Notwithstanding the reduction in earnings, the change in the sales coverage area could not amount to a fundamental breach going to the root of the employment contract if it was not a term of the contract in the first place. The letter of appointment also clearly states that 'the area of coverage may be reviewed from time to time'. (para 42)

**(6)** The High Court also erred in accepting the respondent's reasons for the nine-month delay in terminating the contract of employment, namely, to collect evidence of reduction of income and to wait for compensation promised him by the appellant. The delay was lengthy, and the reasons given for it contradicted the respondent's case that the breach was so fundamental that he regarded himself as dismissed. The second reason given showed that the respondent had condoned the revision on the expectation of the fulfilment of a promise, which could only mean that he did not treat the contract of employment as coming to an end because of the breach. (para 43)

**Case(s) referred to:**

*Afindi Ramli & Anor v. Awana Vacation Resorts Development Bhd [2012] 1 ILR 262* ***(refd)***
*Alan Thomas Bohlsen v. Draftworldwide Sdn Bhd [2009] 1 LNS 550 HC* ***(refd)***
*Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147* ***(refd)***
*Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA* ***(refd)***
*Assunta Hospital v. Dr A Dutt [1980] 1 LNS 121 FC* ***(refd)***
*BSF Auto & Parts Sdn Bhd v. Tan Yam Huat [2005] 2 LNS 1914* ***(refd)***
*Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 FC* ***(refd)***
*Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2014] 4 ILR 241* ***(refd)***
*Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC* ***(refd)***

A *Jagvinder Kaur H Pritam Singh v. Royal Selangor International Sdn Bhd [2008] 3 ILR 293* ***(refd)***
*Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC* ***(refd)***
*Lim Hun Beng v. Awana Vacation Resorts Development Bhd [2013] 2 LNS 1257* ***(refd)***
*Ling Ka Hong v. Crystal Establishment Bhd [2010] 2 LNS 0411* ***(refd)***
*Sibu Steel (Sarawak) Sdn Bhd v. Ahmad Termizie Bujang [1996] 2 ILR 885* ***(refd)***
B *Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor [2017] 8 CLJ 159 CA* ***(refd)***
*Sugarbun Services Corp Bhd v. Ong Siew Choon [2006] 1 ILR 99* ***(refd)***
*The Borneo Post Sdn Bhd v. Margaret Wong [2001] 8 CLJ 758 HC* ***(refd)***
*UMW Industries (1985) Sdn Bhd v. Tay Heong Kin [2001] 2 ILR 317* ***(refd)***
C *Western Excavation (EEC) Ltd v. Sharp [1978] IRLR 27* ***(refd)***
*Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC* ***(refd)***

**Legislation referred to:**
Industrial Court Rules 1967, r. 9
Industrial Relations Act 1967, ss. 20(1), (3), 30(1), (6)

D *For the appellant - Gopal Sri Ram, Joshua Kevin, Damien Chan & Yasmeen Soh; M/s Kevin & Co*
*For the respondent - Koh Wei Jie & Joseph George; M/s Joseph George Assocs*

*[Editor's note: For the High Court judgment, please see Gan Soon Huat v. Sanbos*
E *(Malaysia) Sdn Bhd & Anor [2019] 1 LNS 2146 (overruled in part).]*

*Reported by Wan Sharif Ahmad*

## JUDGMENT

F **Ravinthran Paramaguru JCA:**

### Introduction

**[1]** This is an appeal against the decision of the High Court that allowed a judicial review application in favour of an employee who failed to get relief before the Industrial Court. Before us, only two main issues were argued, ie,
G whether the Industrial Court had substantive jurisdiction in view of the fact that reinstatement was not pleaded and whether the employee was constructively dismissed.

### Background Facts

H **[2]** The respondent worked as a sales representative with the appellant since 1977. His duties included sales, distribution, promotion, debt collection and merchandising in relation to the products of his employer which are liquor and spirits. He was also assigned a sales coverage area. He was paid a monthly salary. He was also paid a commission as is the norm
I with regard to sales representatives. The sales commission rate was based on a formula that took into account the revenue collected from sales and the

time period within which it was collected. It was known as the sales commission scheme. The respondent was given an annual increment of RM50 until 2007. Thereafter, his basic salary of RM2,000 per month was not increased.

**[3]** The initial bone of contention between the employer and the employee was in respect of the sales commission scheme only. In October of 2009, it was revised by the appellant. The respondent said that it was "unilaterally" revised. But nothing turned on it. The respondent accepted the revision of the sales commission scheme and carried on as before until 2016.

**[4]** Things came to a head when the sales commission scheme was again revised on 1 May 2016. In addition, due to reorganisation of its sales outlets, the appellant also removed Negeri Sembilan from the sales coverage area of the respondent. At the same time, the monthly sales target of the respondent was also increased from RM1,500,000 to RM1,690,000. The respondent wrote a letter to express his dissatisfaction. He objected to the revised sales commission scheme that lowered the sales commission rate. He said that it was not in accordance with his employment agreement as it would reduce his monthly sales commission by 42 per cent. Furthermore, the removal of Negeri Sembilan from his coverage area would reduce his monthly sales commission by 30 per cent. The defence of the appellant at the Industrial Court hearing was that the said changes were made in order to streamline the business operation and to remain competitive.

**[5]** The respondent did not resign upon receipt of the letter that notified him of the revision of the sales commission rate and the reorganisation of the sales coverage area. He told the Industrial Court that he remained in employment to collect evidence of reduction in monthly income due to the appellant's practice of releasing the sales commission a few months subsequent to collection of monies from sales. He only resigned nine months later on 10 March 2017 and regarded himself constructively dismissed. On 29 March 2017, he filed a representation under s. 20 of the Industrial Relations Act 1967 (Revised 1976). The Minister referred the representation to the Industrial Court.

**[6]** The Industrial Court dealt with two issues and decided both against the respondent. The court firstly held that since reinstatement was not pleaded as a relief in the statement of case, it ceased to have jurisdiction to make an award. Secondly, it held that the respondent failed to prove that he was constructively dismissed. Consequently, the claim of the respondent was dismissed.

**[7]** At the judicial review application before the High Court, the same two issues were argued. The learned High Court Judge found that the Industrial Court erred in law in ruling that it ceased to have jurisdiction. Secondly, the learned High Court Judge found that the Industrial Court erred in finding that the respondent was not constructively dismissed.

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## Contention Of Parties

**[8]** Before us, counsel for the appellant argued that the Industrial Court correctly decided that it lacked jurisdiction. Learned counsel for the appellant submitted that the Industrial Court lacked "substantive" jurisdiction as opposed to "threshold" jurisdiction as the respondent did not want to be reinstated to his post. In respect of the issue of constructive dismissal, he submitted that the commission payable to the employee was "incentive" and not part of his salary. The respondent accepted amendment to the rate of commission previously. In any event, the respondent condoned the revision by working for nine months.

**[9]** On the other hand, counsel for the respondent echoed the view of the learned High Court Judge who decided that Industrial Court was seized with jurisdiction to hear the matter because of the Ministerial reference under s. 20(3) of the Industrial Relations Act 1967 (Revised 1976). In respect of the constructive dismissal issue, counsel for the respondent submitted that the delay on the part of the respondent in resigning did not amount to condonation of the revised sales commission scheme and the reorganisation of the sales coverage area. He also submitted that the commission that the respondent was paid was not an incentive as found by the Industrial Court but a right. Therefore, the reduction of the sales commission rate amounted to a breach that went to the root of the employment contract. He pointed out that the basic salary of the respondent was only RM2,000 per month whereas the take-home salary amounted to RM27,000 to RM29,000 because of the sales commission that he earned.

## Jurisdiction

**[10]** As we said earlier, the learned Chairman of the Industrial Court held that notwithstanding the reference of the representation of the respondent to the Industrial Court by the Minister, she ceased to have jurisdiction to hear the matter. She referred to ss. 20 and 30 of the Industrial Relations Act 1967 (revised 1976). Section 20(1) states a workman may "make representations in writing to the Director-General to be reinstated". Section 30 provides the power to the Industrial Court to order the exclusive remedy of reinstatement which is not available to the civil court. The learned Chairman reasoned that because the respondent did not plead for the remedy of reinstatement in the statement of case and also confirmed during the hearing that he was only seeking a monetary award, the Industrial Court was deprived of jurisdiction. She cited two authorities in support. We shall consider them below.

**[11]** In *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521, the employee no longer wanted reinstatement by the time of the hearing as she was gainfully employed in another hotel. Haidar Mohd Noor J held that the Industrial Court no longer had jurisdiction

to make an award for damages or compensation *in lieu* of reinstatement under s. 30(1) of Industrial Relations Act 1967 (Revised 1976) as the respondent clearly did not want her job back with the applicant. His Lordship said as follows:

> It is essentially on the issue of reinstatement. As stated by me earlier the respondent in her representations initially wanted reinstatement which is in accordance with s. 20(1) of Industrial Relations Act 1967 (Revised 1976) but subsequently in the hearing before the Industrial Court she changed her stand and instead asked for damages *in lieu* of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provisions of s. 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have any more jurisdiction.

**[12]** His Lordship added that for the Industrial Court to be seized with the power to order compensation:

> (i) the workman must "want his job back"; and
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> (ii) although the workman wants his job back, the Industrial Court would not order reinstatement.

**[13]** The learned Chairman also relied on the Industrial Court case of *Jagvinder Kaur H Pritam Singh v. Royal Selangor International Sdn Bhd* [2008] 3 ILR 293 where the learned Chairman opined that once an employee abandons a claim for reinstatement after his case is referred to the Industrial Court by the Minister, the court ceases to have jurisdiction.

**[14]** In adopting the view expressed in *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* (*supra*) on this point, the learned Chairman in the instant case declined to follow the decision in *The Borneo Post Sdn Bhd v. Margaret Wong* [2001] 8 CLJ 758, where an opposite view prevailed. In that case as well, the employee did not pray for reinstatement in the statement of case filed at the Industrial Court. Denis Ong J held that the omission to pray for reinstatement is a point of procedure and does not affect the jurisdiction of the court. His Lordship said as follows:

> The omission in the statement of the case to state it as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits: see s. 29(d) of Act 177. *The Industrial Court derives its jurisdiction from the order of reference by the minister made under s. 20(3) of Act 177 and which such court must exercise, so it was held in Assunta Hospital v. Dr A Dutt [1980] 1 LNS 121; [1981] 1 MLJ 115 FC.*
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> (emphasis added)

**[15]** In *Assunta Hospital v. Dr A Dutt* [1980] 1 LNS 121; [1981] 1 MLJ 115 that was cited in the above-mentioned passage, the issue of lack of jurisdiction arose in this way. It was emphasised by counsel for the employer

that the employee is a non-citizen. Chang Min Tat FJ dismissed the argument and said that whether the employee can extend his work permit or not is not a factor that "can influence the court in the proper exercise of the jurisdiction conferred on it by the Minister's reference". His Lordship continued as follows:

> Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for *mandamus*. Section 29 of the Act spelling out the powers of the court is expressed in discretionary terms. The court may take any of the steps set out in the section, and generally "direct and do all such things as are necessary or expedient for the expeditious determination of the trade dispute or the reference under section 20(3)." But there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of duty to renounce the jurisdiction to hear the reference.

**[16]** The learned High Court Judge in the court below preferred the view of Denis Ong J in *The Borneo Post Sdn Bhd v. Margaret Wong* (*supra*). He noted that the said authority had been followed by a host of Industrial Court cases. In particular, the learned High Court Judge endorsed the decision of the learned Chairman in *Sibu Steel (Sarawak) Sdn Bhd v. Ahmad Termizie Bujang* [1996] 2 ILR 885 who ruled that the Industrial Court's jurisdiction cannot be determined by the mere statement of a workman that he continues to desire and seek the remedy of reinstatement.

**[17]** The learned High Court Judge also said as follows:

> [14] In determining this issue, firstly, it must be remembered that the paramount objective of IRA 1967 is to protect the interest of the employees. In addition, the IRA is a piece of social legislation and the Industrial Court must act in accordance with equity, good conscience and substantial merit of the case without regard to technicalities and legal form as provided under section 30(5) of the IRA 1967.
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> [15] The objective of the IRA 1967 and the provision of section 30(5) will be meaningless if the Industrial Court cease to have jurisdiction when no claim for reinstatement is made. The employees right to have their claims heard before the Industrial Court should not be hindered just because the employee did not want to be reinstated for myriads of reasons. One acceptable reason is that there is no longer trust and confidence between the employee and the employer. Further, for the reason of industrial harmony, reinstatement may not be an appropriate option.

**[18]** On our part, we wholly agree with the decision of the learned High Court Judge that the Industrial Court was seized with jurisdiction to hear the dispute between the employer and employee in this case once the Minister had duly made a reference under s. 20(3) of the Industrial Relations Act 1967 (Revised 1976). As stated by Denis Ong J in *The Borneo Post Sdn Bhd*

*v. Margaret Wong* (*supra*) and Chang Min Tat FJ in *Assunta Hospital v. Dr A Dutt* (*supra*), the Industrial Court is invested with jurisdiction because of the Ministerial reference.

**[19]** Counsel for the appellant did not dispute that the Industrial Court had jurisdiction at the "threshold" stage because of the Ministerial reference. However, he argued that there must be a distinction drawn between "threshold" and "substantive" jurisdiction. He said that Industrial Court was not relieved of the duty to ask whether it continued to be seized with "substantive" jurisdiction because reinstatement was not pleaded and asked for at the hearing.

**[20]** The issue of "threshold" and "substantive" jurisdiction was only raised briefly in the oral argument before us. It was not addressed in the written submissions. It does not appear to have been argued at the Industrial Court or the High Court either. Nonetheless, we have given anxious consideration to these submissions as it may affect pending and future Industrial Court matters. As we understand the meaning of threshold jurisdiction, it is the jurisdiction to enter into an inquiry. This was lucidly explained in *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 by Gopal Sri Ram JCA (as he then was) who sat as a Federal Court Judge. The matter involved industrial law. The relevant excerpts from the judgment read as follows:

> At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed "threshold jurisdiction" in recognition of a public decision maker's inability to cross the threshold, as it were, and enter upon the inquiry in question. It is jurisdiction in the narrow sense.
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> ... The Industrial Court is therefore empowered to take cognisance of a trade dispute and adjudicate upon it only when the Minister makes a reference. **In other words, it is the reference that constitutes threshold jurisdiction**. (emphasis added)

**[21]** There can be no dispute that the Industrial Court was seized with "threshold jurisdiction" in the instant case to commence hearing. However, counsel for the appellant submitted that once the inquiry commenced, Industrial Court ceased to have "substantive" jurisdiction because the remedy of reinstatement was not sought. In *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* (*supra*), the Federal Court drew a distinction between the threshold jurisdiction which was called the "narrow jurisdiction" and the jurisdiction in the wider sense which is called "*Anisminic* jurisdiction" (name after well-known House of Lords case of *Anisminic Ltd v. Foreign*

*Compensation Commission* [1969] 2 AC 147). The landmark House of Lords case was said to have removed the distinction between excess of jurisdiction and error of law.

**[22]** As for "substantive jurisdiction", it is not mentioned in the Industrial Relations Act 1967 (Revised 1976). In *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* (*supra*), the following passage of the judgment of the Supreme Court appears to deal with jurisdiction other than the "threshold" jurisdiction:

> Once it is seised of the dispute in the threshold sense, the Industrial Court, unlike the authorities at the preceding three levels, is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. Thus, for example, it has jurisdiction to decide whether the particular claimant is a workman or whether a dispute is extra-territorial in nature. This is sometimes referred to as "the jurisdiction to decide whether there is jurisdiction".

**[23]** But it must be noted that "substantive jurisdiction" is not discussed or mentioned specifically. Be that as it may, for the purpose of our discussion, we take the "substantive" jurisdiction argument of counsel for the appellant to mean that the Industrial Court ceased to have jurisdiction because it has no power under the Industrial Relations Act 1967 (Revised 1976) to adjudicate when the remedy of reinstatement is not pleaded or prayed for. With respect to counsel for the appellant, we are of the view that the Industrial Court did not cease to have "substantive" jurisdiction merely because the remedy of reinstatement was not pleaded or asked for at the hearing. In addition to the reasons given by Denis Ong J in *The Borneo Post Sdn Bhd v. Margaret Wong* (*supra*) and the learned High Court Judge in the instant case, our other reasons are as follows.

**[24]** Now, as has been acknowledged in numerous cases, the Industrial Relations Act 1967 (Revised 1976) is a beneficent social legislation meant to provide better remedies for employees than that granted under common law. At common law, an employee cannot avail the remedy of reinstatement and may only obtain "meagre" compensation. In *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238, Raja Azlan Shah CJ (Malaya) (as HRH then was) observed as follows:

> In the case of a claim for wrongful dismissal, a workman may bring an action for damages at common law. This is the usual remedy for breach of contract, eg, a summary dismissal where the workman has not committed misconduct. The rewards, however, are rather meagre because in practice the damages are limited to the pay which would have been earned by the workman had the proper period of notice been given. He may even get less than the wages for the period of notice if it can be proved that he could obtain similar job immediately or during the notice period with some other employer.

**[25]** In respect of the remedies that an employee may obtain at the Industrial Court, His Lordship said as follows:

> Reinstatement, a statutorily recognised form of specific performance, has become a normal remedy and this coupled with a full refund of his wages could certainly far exceed the meagre damages normally granted at common law.

**[26]** Thus, it must be noted that "reinstatement" is not the only reason for a dismissed employee to make representation to the Director General under s. 20(1) of the Industrial Relations Act 1967 (Revised 1976) with a view of having his case referred to the Industrial Court. He may avail more generous damages in the form of compensation and back wages from the Industrial Court as compared to what he can get under common law.

**[27]** However, at the point of making representation to the Director General under s. 20(1), an employee who considers himself dismissed without just cause or excuse is obliged to seek "to be reinstated in his former employment". This is the only reference in the Industrial Relations Act 1967 (Revised 1976) to the remedy of reinstatement insofar as the prosecution of the claim of the employee is concerned. The other reference to the remedy of reinstatement is in respect of the power of the Industrial Court to grant the said remedy when making the award under s. 30. Therefore, it follows that once the case is referred to the Industrial Court by the Minister, there is no longer a specific requirement in the Act for the employee to plead the remedy of reinstatement. The Industrial Court Rules 1967 which governs the procedure of the Industrial Court does not impose the obligation to plead the remedy of reinstatement in the statement of case either. Rule 9 stipulates that the statement of case shall contain the following:

> (a) a statement of all relevant facts and arguments;
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> (b) particulars of decisions prayed for;
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> (c) an endorsement of the name of the first party and of his address for service; and
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> (d) as an appendix or attachment, a bundle of all relevant documents relating to the case.

**[28]** In the premises, the requirement to plead reinstatement as a remedy is only material at the stage of making a representation to the Director General. In our view, the real issue that arises from the "substantive jurisdiction" argument canvassed by counsel for the appellant is whether the Industrial Court would exceed its statutory powers in granting monetary relief when reinstatement is not pleaded or asked for at the Industrial Court hearing. In our view, this question must be answered in the negative. In respect of the powers of the Industrial Court in giving relief, s. 30(6) of the Industrial Relations Act 1967 (Revised 1976) gives the court very wide discretion. The provision reads as follows:

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> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under subsection 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under subsection 20(3).

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**[29]** As we said earlier, the only relief envisaged in s. 20(1) at the inceptive representation stage is the remedy of reinstatement. But s. 30(6) empowers the Industrial Court to include in the award "any matter or thing which it thinks necessary or expedient". Hence, even if reinstatement was pleaded and asked for, the Industrial Court is not restricted to the said relief. As we

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pointed out, there is no statutory obligation to plead or ask for reinstatement before the Industrial Court. In the premises, the Industrial Court cannot be said to commit an error of law if it grants monetary relief when reinstatement was not pleaded or asked for. Therefore, the question of the Industrial Court ceasing to possess "substantive" jurisdiction cannot arise.

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**[30]** In concluding this part of the judgment, we find it necessary to repeat what was said about the function of the Industrial Court in the past. Generally speaking, it is two-fold as succinctly stated in the following passage by the Federal Court in *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 4 ILR 241:

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> [33] It is trite law that the function of the Industrial Court under s. 20 of the Industrial Relations Act 1967 is twofold, first, to determine whether the alleged misconduct has been established, and secondly whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on its merits would be a jurisdictional error

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> which would merit interference by *certiorari* by the High Court (see *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537).

**[31]** Therefore, it is not the function of the Industrial Court to question its own jurisdiction simply because the remedy of reinstatement is not pleaded or sought. In the light of the occasional conflict of views in the Industrial

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Courts on the issue of jurisdiction if reinstatement is not pleaded or claimed, we state here that the decision in *The Borneo Post Sdn Bhd v. Margaret Wong* (*supra*) on this point is correct. The Industrial Court does not cease to have jurisdiction once a reference is duly made under s. 20(1) of the Industrial Relations Act 1967 (Revised 1976) even if the remedy of reinstatement is not

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pleaded or pursued at the hearing.

**Whether Constructive Dismissal?**

**[32]** Whether the respondent was constructively dismissed is the second issue in this case. At the outset, the learned Industrial Court Chairman

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directed herself on the law with regard to the burden of proof. She held that it is incumbent on the employee to prove that he was entitled to regard himself constructively dismissed. Once he discharged that burden, it is on the employer to prove that the dismissal was without just cause or excuse.

**[33]** In respect of the meaning of "constructive dismissal", she cited the Supreme Court case of *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 which is the oft-cited authority in respect of the application of the said common law concept in the field of industrial law. Salleh Abas LP in the above-mentioned landmark case held that "dismissal" in s. 20 of the Industrial Relations Act 1967 (Revised 1976) includes "constructive dismissal". As to the definition of "constructive dismissal", His Lordship in approving the "contract test" formulated by Lord Denning in *Western Excavation (EEC) Ltd v. Sharp* [1978] IRLR 27 said as follows:

> According to the Court of Appeal in *Western Excavation (ECC) Ltd v. Sharp* [1978] IRLR 27, it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situations the employee is entitled to regard himself as being dismissed and walk out of his employment.

**[34]** The relevant passage in the judgment of Lord Denning in the *Western Excavation* case (*supra*) is as follows:

> ... if the employer is guilty of conduct which is a significant breach going to the root of contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates his contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances, at the instant without giving notice at all or, alternatively, may give notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

**[35]** The "contract test" was re-stated by Mahadev Shankar JCA at the Court of Appeal in *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197 in the following passage:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether "the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract".

**[36]** However, the learned Chairman found that the respondent failed to prove that he was entitled to regard himself as dismissed from employment. Her reasons, briefly stated, are as follows. She held that the sales commission that the sales representatives were paid was not a "right" but an "incentive" under the terms of the employment contract. She noted that the respondent

had accepted the previous revision of the sales commission rate as well. Moreover, the revision of sales commission rate applied to all the sales representatives and not to the respondent alone. Furthermore, after the respondent complained, the employer agreed to give him additional benefits due to his seniority *via* a letter dated 3 June 2016. The respondent did not reply to this letter but accepted the additional benefit and worked for a further nine months. In respect of the removal of Negeri Sembilan from the respondent's sales coverage area, the learned Chairman said that the reassignment exercise affected all sale representatives and not the respondent alone. Therefore, she found that the respondent's allegation that he was subject to duress and undue influence in his letter of resignation dated 10 March 2017 to be an afterthought.

**[37]** At the judicial review hearing, the learned High Court Judge held that the revision of the sales commission rate and change in the coverage area of the respondent which resulted in substantially reduced earnings amounted to a breach going to the root of the contract of employment. His Lordship cited the cases of *Alan Thomas Bohlsen v. Draftworldwide Sdn Bhd* [2009] 1 LNS 550; [2009] 8 MLJ 461 and *Ling Ka Hong v. Crystal Establishment Bhd* [2010] 1 LNS 0411; [2010] 4 MELR 619 which held reduction in earnings would entitle an employee to resign. In respect of the ruling of the Industrial Court Chairman that the commission payable to the respondent is only an incentive, the learned High Court Judge cited *Sugarbun Services Corp Bhd v. Ong Siew Choon* [2006] 1 ILR 99; [2005] 3 MELR 674 where it was held that the unilateral reduction of a fixed annual bonus is a serious breach of the contract of employment. He also cited *BSF Auto & Parts Sdn Bhd v. Tan Yam Huat* [2005] 2 LNS 1914 where a unilateral removal of a fixed allowance was held to be a breach of a fundamental term of the employment contract. In respect of the nine months that the respondent took to resign from employment, the learned High Court Judge said that the circumstances has to be looked into. In respect of the instant case, the learned High Court Judge accepted the following explanation for the delay. The respondent said that he wanted to collect evidence of reduction in income and that he was also waiting for the fulfilment of the promise of the managing director to compensate him with six months of sales volume at a commission rate of 1.5%. But that promise was not fulfilled.

**Our Decision On Constructive Dismissal**

**[38]** We are of the considered view that the learned High Court Judge erred in reversing the decision of the Industrial Court on the issue of constructive dismissal. Our reasons are as follows. As stated in the authorities we cited earlier, an employee is only entitled to regard himself as dismissed if there is a breach of the fundamental terms of the contract of employment. In the letter of resignation, the respondent only gave two reasons for leaving

employment, ie, the revision of sales commission rate and the change in his area of sales coverage which would reduce his monthly earnings. Therefore, the only question that arises is whether these two complaints amounted to a breach of the fundamental terms of the employment contract. The other reasons he advanced at the Industrial Court hearing are not relevant as an employee cannot rely on reasons not given for considering himself constructively dismissed. Anyway, both the Industrial Court and High Court rightly did not address them.

**[39]** We shall first consider the revision of the sales commission rate. When the respondent first commenced work with the appellant, the sales commission rate was already stated in his letter of appointment. Nonetheless, we of the view that the payment of sales commission according to the rate that is stated in the letter of appointment is not a fundamental term of the employment contract. It is clearly stated that the sales commission is "an incentive" for "good performance" and that it is based on "sales volume". It follows that it is not a fixed allowance unlike the annual bonus stated in the letter of appointment. Secondly, it must be noted that the sales commission rate stated in the letter of appointment was revised about 14 years later in 2009. The respondent accepted it and did not walk out of his employment. Thus, he accepted that the rate of commission can be varied by the employer. Only in respect of the latest revision of the sales commission rate in May of 2016, the respondent objected and resigned nine months after it was implemented.

**[40]** The learned High Court Judge took into account the 42 per cent reduction in earnings when finding that there was a fundamental breach of the terms of the contract. In our respectful view, the matter should have been approached by answering the question whether the appellant was entitled to vary the sales commission rate under the terms of the contract. As we pointed out, the income that is generated from the commission earned on sales is not fixed. The cases of *Sugarbun Services Corp Bhd v. Ong Siew Choon* (*supra*) and *BSF Auto & Parts Sdn Bhd v. Tan Yam Huat* (*supra*) relied on by the High Court involved removal of fixed allowances unlike in the instant case. In a number of previous Industrial Court cases involving downward revision or removal of commissions which were not fixed, it was held that there was no fundamental breach of the terms of the employment contract (see *UMW Industries (1985) Sdn Bhd v. Tay Heong Kin* [2001] 2 ILR 317; *Afindi Ramli & Anor v. Awana Vacation Resorts Development Bhd* [2012] 1 ILR 262; and *Lim Hun Beng v. Awana Vacation Resorts Development Bhd* [2013] 2 LNS 1257).

**[41]** In the instant case, the employment contract refers to the payment of commission as an "incentive". If no commission was paid at all, there could be a ground for complaint as the letter of appointment states that the commission will be paid for sales. The dispute here is not the removal of the payment of the commission but the variation of the rate of the payable

commission. The letter of appointment does not state that the sales commission rate is fixed or that it cannot be varied. In fact, the respondent accepted a previous revision of the sales commission rate in 2009. Therefore, the rate stated in the letter of employment was not the prevailing rate when the latest revision in the sales commission rate was implemented. In the premises, the respondent cannot take the position that the sales commission rate is unalterably cast in stone. Therefore, we find that the learned High Court Judge erred in holding that the revision of the sales commission rate was a fundamental breach of the contract of employment.

**[42]** The only other complaint of the respondent in the letter of resignation was that when Negeri Sembilan was removed from his area of sales coverage, his earnings from sales commission dropped by 30 per cent. The learned High Court Judge also viewed this to be a breach of a fundamental term as it lowered his earnings significantly. In our view, notwithstanding the reduction in earnings, the change in the sales coverage area cannot amount to a fundamental breach going to the root of the employment contract if it was not a term of the contract in the first place. In the letter of appointment, Negeri Sembilan was not included in the area of coverage of the respondent. It was added much later. Furthermore, the letter of appointment clearly states that "the area of coverage may be reviewed from time to time as and when the need arises". There was no evidence placed before the Industrial Court that the appellant deliberately victimised the respondent by removing Negeri Sembilan from his area of coverage. The reason given for the change in the coverage area was that the appellant wanted to re-align all the sales representatives with the sales outlets for the purpose of reducing overlapping of coverage areas and costs. The review of the coverage area, like the revision of the sales commission rate, affected all sales representatives and not the appellant alone. This is certainly a matter for management judgment and discretion alone. For that reason, we are of the view that the High Court erred in holding that the removal of Negeri Sembilan from the respondent's area of coverage constituted a breach of a fundamental term of the contract of employment.

**[43]** We are also of the view that the learned High Court Judge erred in accepting the reasons for the delay on the part of the respondent in terminating the contract of employment by not resigning immediately. Whilst we agree with His Lordship's reasoning that the circumstances of the delay can be looked into, the delay of nine months in the instant case was lengthy and the reasons for the delay contradict the case of the respondent that the breach was so fundamental that he regarded himself as dismissed. It is more of an afterthought. The respondent told the Industrial Court that he wanted to "collect evidence" of reduction of income. The letter of appointment states that commission would be paid two months after the sales in question. The respondent said that the commission due to him were

"pending two to three months". Nonetheless, he waited for nine months before turning in his resignation letter. Meanwhile, he accepted the extra benefits that were offered to him alone after he complained about the revision of the sales commission rate. He did not indicate that he would be leaving. The other reason considered by the learned High Court Judge was that the respondent waited for the fulfilment of an oral promise by the managing director to compensate the respondent with six months of sales volume at a commission rate of 1.5%. We find this reason for the delay to be unmeritorious because it simply means that the respondent condoned the revision of the sales commission rate and wanted to carry on with his employment on the expectation of the fulfilment of a promise. Thus, he did not treat the contract of employment as coming to an end because of the alleged breach.

**[44]** In the *Western Excavation* case (*supra*), Lord Denning emphasised the importance of the employee leaving employment immediately lest he is regarded as affirming the contract of employment. His Lordship said as follows:

> Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time, without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

**[45]** Similarly, in *Southern Investment Bank Bhd/Southern Bank & Anor v. Yap Fat & Anor* [2017] 8 CLJ 159; [2017] 3 MLJ 327, this court held that in a claim for constructive dismissal, it is imperative for the employee to walk out of his employment within a reasonable time after the alleged breach of contract. In the instant case, as we said, apart from expressing dissatisfaction with the revised sales commission rate and the removal of Negeri Sembilan from the sales coverage area, no indication about leaving employment was given for nine months. In the premises, the respondent had waived the breach, if any, on the part of the appellant.

## Conclusion

**[46]** For all the above reasons, we allow the appeal and set aside the decision of the High Court. No order as to costs.